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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALVIN W. DODSON, JR.
PRIVATE FIRST CLASS, U.S. MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

KATHLEEN J. PURCELL
*JOSEPH REMCHO
LOWELL FINLEY
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, Suite 800
San Francisco, California 94104
(415) 398-6230

**Counsel of Record*

DAVID C. LARSON
CAPTAIN, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Acticity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-2297

Counsel for Petitioner

September 12, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether military courts may convict servicemembers of offenses carrying a minimum life sentence by a mere two-thirds vote when Article 52(b)(2) of the Uniform Code of Military Justice requires a three-fourths vote to impose any sentence greater than ten years.

2. Whether PFC Alvin Dodson was denied due process of law, in a close factual case in which the black accuseds were convicted and the white acquitted, when he was convicted of first degree murder and sentenced to life imprisonment on the vote of only five members of a seven-member Marine Corps panel, where the convening authority's hand-picked venire included no members even close to Private Dodson's rank and he was permitted only one peremptory challenge.

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Alvin W. Dodson, Jr. respectfully prays that a writ of certiorari issue to review the opinions and judgment of the United States Court of Military Appeals, entered in the above-entitled proceeding on July 14, 1986 and January 27, 1986.

OPINIONS BELOW

The initial opinion of the United States Court of Military Appeals, rendered without oral argument, is reported at 21 M.J. 237, and is reprinted in the appendix hereto, p. 7a, *infra.* That court's opinion on petition for reconsideration is reported at 22 M.J. 257, and is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the United States Navy-Marine Corps Court of Military Review is reported at 16 M.J. 921. It is reprinted in the appendix hereto, p. 13a, *infra.*

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on January 27, 1986. The petition for rehearing was denied, after oral argument, on July 14, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1259(3).

STATUTES INVOLVED

Article 52(a), UCMJ, 10 U.S.C. § 852(a).

> (a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.
>
> (2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

Article 52(b)(2), UCMJ, 10 U.S.C. §852(b)(2).

> (2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

Article 118, UCMJ, 10 U.S.C. § 918.

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> (2) intends to kill or inflict great bodily harm;
>
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

Manual for Courts-Martial (MCM) 1969 ¶74(d)(3).

> (3) *Numbers of votes required.* No person may be convicted of an offense for which the death penalty is made mandatory by law (see, for example, Art. 106), except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person may be convicted of any other offense, when voting is required (74d(1)), except by the concurrence of two-thirds of the members present at the time the vote is taken (Art. 52). If, in computing the number of votes required, a fraction results, the fraction will be counted as one; thus, if five mem-

bers are to vote, a requirement that two-thirds concur is not met unless four concur...

STATEMENT OF THE CASE

Petitioner was charged with several offenses arising from the death of one Michael Murphy: attempted robbery, conspiracy to commit robbery, premeditated and felony murder, robbery, and wrongful communication of a threat. The government sought the death penalty.

Petitioner pled innocent to all charges.

Trial was had before a general court-martial composed of seven members.[1] The military judge, pursuant to the Manual for Courts-Martial 1969, paragraph 74d and Article 52(a)(2), UCMJ, instructed the members that they needed the concurrence of only two-thirds (five) of the members to find petitioner guilty as charged.

Petitioner was convicted on all charges by two-thirds vote. The premeditated and felony murder charges carry a mandatory minimum sentence of life imprisonment. Article 118, UCMJ, 10 U.S.C. § 918. At trial, the defense moved to dismiss the premeditated and felony murder specifications on the grounds that, because of the mandatory minimum sentence provision, a vote of three-fourths (six) of the members should have been required to convict. The motion was denied but notes for the record. (Reporter's Transcript (RT) 813.)

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[1] The commander convening a general court-martial has the discretion to appoint any number so long as five or more serve. 10 U.S.C. § 816(1)(A).

After a separate vote disclosed that the unanimity required to impose the death penalty was lacking, petitioner was automatically sentenced to confinement at hard labor for life. The convening authority approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review and the United States Court of Military Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO CORRECT THE CONSISTENT REFUSAL OF THE MILITARY COURTS TO COMPLY WITH THE REQUIREMENTS OF ARTICLE 52(b)(2) OF THE UNIFORM CODE OF MILITARY JUSTICE

The primary issue presented by this case is the construction of three sections of the Uniform Code of Military Justice (UCMJ). The military courts and all branches of the military have falsely construed two of the sections to be in conflict with a third. Having created this false conflict, they then proceeded to resolve it by reducing the percentage vote required for conviction in premeditated and felony murder cases from the statutorily required three-fourths vote to a mere two-thirds vote. *United States v. Walker,* 7 C.M.A. 669, 23 C.M.R. 133, 137-39 (1957).[2] As we discuss below, there is no real conflict at all. And the military's interpretation is both demonstrably prejudicial and in conflict with the decisions of this Court regarding the requirements of due process in jury cases. The UCMJ provisions are these:

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[2] Although the government relied on *Walker,* the courts below did not cite it or any other authority in denying relief on this ground.

Article 52(b)(2), 10 U.S.C. § 852(b)(2) provides:

> No person may be sentenced to *life imprisonment* or to confinement for more than ten years, except by the concurrence of *three-fourths* of the members present at the time the vote is taken.
>
> (Emphasis added.)

Article 118, 10 U.S.C. § 918 provides for a mandatory sentence of at least life imprisonment for two specified offenses:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill; . . . or
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> . . . shall suffer death or imprisonment for life as a court-martial may direct.

These sections, of course, are perfectly compatible. Congress has required a three-fourths vote to sentence to life imprisonment and it has set a mandatory life sentence for certain offenses. Requiring a three-fourths vote to convict for those offenses is consistent with both sections.

The military and the courts below, however, have seized on a third statute, Article 52(a)(2), and insisted that it creates a conflict with Articles 52(b)(2) and 118. Article 52(a)(2) provides:

> No person may be convicted of [any offense other than one carrying the mandatory death penalty] except . . . by the concurrence of two-thirds of the members present at the time the vote is taken.

The government argues that because Article 52(a)(2) calls for a two-thirds vote to convict and Article 118 requires a mandatory minimum life sentence, Article 52(b)(2) must be overriden. The government creates a conflict and then resolves it by saying that the section providing the least protection to the accused must control. But, in fact, there is no conflict. The three sections can easily be harmonized.

The three-fourths vote required by Article 52(b)(2) includes within it, as a matter of mathematical necessity, the two-thirds vote required by Article 52(a)(2). By instructing that a three-fourths vote is required in the Article 118 (1) and (4) murder cases, the military judge could have easily harmonized all three sections. Had six of the seven members voted for conviction, then the accused would have been convicted by at least a two-thirds vote, satisfying Article 52(a)(2), and, because the life sentence is the mandatory minimum, he would also have been sentenced by the three-fourths vote necessary to satisfy Article 52(b)(2).[3]

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[3] The alternative of permitting the members to convict by two-thirds vote but requiring a separate three-fourths vote to impose the life sentence would not reconcile the three statutes, because it would require the members to disregard Congress' clearly expressed intention that a vote to convict should result *automatically* in a minimum life sentence. Article 118, UCMJ, 10 U.S.C. § 918.

The government's construction views the two-thirds vote requirement as a right of the prosecutor, rather than the accused. This, of course, is clearly wrong. Article 52(a)(2) is a right granted the accused, not the government: "No person may be convicted . . . except."

Because the jury in this case consisted of only seven members, it was critical whether conviction and the life sentence required concurrence of two-thirds (five) or three-fourths (six) of the members. Every vote was enormously important. The smaller the fact finding body, the less likelihood there is of a fair result. *Ballew v. Georgia,* 435 U.S. 223, 234 (1978). In *Ballew,* this Court invalidated a Georgia statute allowing a jury of five persons. The plurality opinion concluded:

> the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.
>
> 435 U.S. at 239.

The next term, in *Burch v. Louisiana,* 441 U.S. 130, 134 (1979), this Court held that conviction by other than a unanimous six-person jury in a trial for a non-petty offense is unconstitutional:

> [W]e think that when a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.

441 U.S. at 139.[4]

Moreover, the facts of this case were very close and the case was freighted with racial overtones. Two blacks and a white were accused of murdering a white Marine. All three were alleged to have acted in concert. The government chose three separate trials and when the courtroom smoke had cleared, the two blacks were convicted and the white was acquitted.

If a true problem of ambiguity or conflict in the statutes were presented here, the principles for resolving it would be clear. Under settled principles, this Court will adopt any fair construction of a statute by which serious doubts as to its constitutionality may be avoided. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). This Court has been "willing to assume a congressional solicitude for fair procedure, absent express statutory language to the contrary." *Ibid.* Fi-

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[4] The holdings in *Ballew* and *Burch* were based on the sixth amendment's jury trial guarantee, which this Court has stated does not apply to the military. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Ex Parte Quirin*, 317 U.S. 1, 40 (1942); *see O'Callahan v. Parker*, 395 U.S. 258, 296-97 (1969). Both *Ballew* and *Burch*, however, emphasized the due process underpinnings of the jury trial right. "Much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the *fairness of the proceeding* and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. *Burch v. Louisiana*, *supra*, 441 U.S. at 138 (citations omitted; emphasis supplied). A service-member is entitled to the due process of law guaranteed by the fifth amendment. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Cooke v. Orser*, 12 M.J. 335, 338 (C.M.A. 1982).

nally, ambiguity in a criminal statute will be resolved in favor of the accused. *Liparota v. United States*, ___ U.S. ___, 105 S.Ct. 2084, 2089 (1985). In this case, however, resort to these rules of construction is unnecessary.

Here, there is no need to reach out—as the military has—to create conflicts and construe statutes. The language of each of the code sections is clear and unambiguous. There is no need to stretch to force them to fit the mold desired by either government or accused. By instructing the panel that a three-fourths vote was required for conviction, the military judge could have complied with the mandate of Congress as expressed in each of those sections.

The obvious intent of Congress in enacting Article 52(b)(2) was to provide added assurances of fairness and reliability when a servicemember is tried for an offense that carries a long term of imprisonment.[5] That intent was abrogated in this case. Review should be granted to put an end to this clear violation of the federal statute.

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[5] The summary treatment accorded this issue by the lower appellate tribunals in this case underscores the need for guidance from this Court. The United States Navy-Marine Corps Court of Military Review concluded, without any discussion, that there was no merit in petitioner's arguments regarding the voting requirements (21 M.J. at 930, App. 30a, *infra.*) Although petitioner specified the issue in seeking review in the United States Court of Military Appeals, that court declined to include the issue in the questions it specified for briefing, oral argument, and opinion.

II. UNDER THE TOTALITY OF CIRCUMSTANCES IN THIS CASE THE SELECTION, COMPOSITION AND VOTING REQUIREMENTS OF THE MILITARY JURY VIOLATED DUE PROCESS OF LAW

The evidence in this case was purely circumstantial. It is precisely in this sort of case that the selection and the composition of a jury of peers is so critical. Yet, in this case,

(1) Petitioner asked for and was refused a random selection of the jury;

(2) No person lower in grade than an E-7 (master sergeant) was appointed to the panel (petitioner holds the rank of private first class);

(3) No persons from other services were appointed to serve, notwithstanding their easy availability to the command;

(4) The court consisted of only seven persons in a capital case;

(5) The court was instructed that the votes of only five of those seven persons was necessary to convict; and

(6) Petitioner had only one peremptory challenge.[6]

Any one of these circumstances would have required reversal in a state or federal court. *Ballew v. Georgia, supra,* 435 U.S. 223; *Burch v. Louisiana, supra,* 441 U.S. 130; *Smith v. Texas,* 311 U.S. 128 (1940). None standing alone has yet been held to deny due process of law in the military courts, but the

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[6] These points were raised by the accused and overruled in the course of trial. (*See* Appellate Exhibit 1, RT 166; RT 199; RT 813-14; Appellate Exhibit XLVIII, RT 172.)

reasoning of those cases combined with the clear intent of Congress that a sentence to more than ten years in confinement not be adjudged by less than a three-fourths vote in a military court makes it clear that, in the totality of the circumstances, petitioner was denied due process of law. And, although the rights of those in the armed forces may be conditioned to meet the exigencies of a military situation,

> [the] military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of this constitutional rights.
>
> *Burns v. Wilson,* 346 U.S. 137, 142 (1953).

Since *Burns,* this Court has consistently required the armed forces to point to a military interest that must be protected before it has sanctioned depriving servicemembers of basic constitutional rights. *See Goldman v. Weinberger,* ___ U.S. ___, 106 S.Ct. 1310 (1986) (denial of first amendment right to wear religiously mandated headgear justified by military's interest in preserving strict obedience to regulations); *Chappell v. Wallace,* 462 U.S. 296 (1983) (denial of access of civil process to redress race discrimination grievance justified by military's need to ensure strict obedience and discipline); *Parker v. Levy,* 417 U.S. 733 (1974) (denial of first amendment right to free expression necessary to maintain discipline and order). The Court of Military Appeals has repeated this theme in its own cases. *United States v. Ezell,* 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams,* 1 M.J. 267, 270 (C.M.A. 1976).

The right to due process of law before life or liberty are taken away is the most cherished of all our con-

stitutional rights. A fundamental aspect of due process in a criminal trial under the fifth amendment, and the one central to this issue, is the standard of proof beyond a reasonable doubt required to convict. *In Re Winship,* 397 U.S. 358 (1970). The infirm circumstances in this case concerning the selection and number of veniremen and the guilt determining process itself (listed at the outset of this argument) undermine the reasonable doubt standard and combine to deny due process of law. Moreover, these are not unique circumstances; they are typical of any general court-martial. Yet, despite the consistent position taken by this Court, the military appellate courts have not required the services to identify a legitimate military interest that would justify this denial of due process, despite plenty of opportunity to do so. It is time for this Court to step in.

Here, although the trial was overseas, there was no state of war or other emergency. Personnel to comprise a jury in accord with due process requirements were readily available, in large numbers. The government has not and cannot meet its burden to justify such radical departure from traditional standards of due process.[7]

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[7] The denial of requests for random selection is a particularly questionable but widespread practice of the military courts. In a 1977 report, the General Accounting Office recommended that Congress mandate random selection. *See* Report to the Congress by the Comptroller General of the United States, *Military Jury System Needs Safeguards Found in Civilian Federal Courts* (June 6, 1977). *See generally, United States v. Crawford,* 15 C.M.A. 31, 35 C.M.R. 3 (1964); *United States v. Greene,* 20 C.M.A. 232, 43 C.M.R. 72 (1970); Remcho, *Military Juries: Constitutional Analysis and the Need for Reform,* 47 Indiana L.Rev. 194 (1972);

Three defendants were tried for murder on a purely circumstantial case. Two of the three, including petitioner, are black. One is white. The victim was white. Each of the three was tried on essentially the same evidence. Only the white Marine was acquitted. This is a classic factual situation calling for a closer examination of the process by which military juries are selected and instructed to vote.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KATHLEEN J. PURCELL
*JOSEPH REMCHO
LOWELL FINLEY
REMCHO, JOHANSEN & PURCELL
**Counsel of Record*

DAVID C. LARSON
Captain, JAGC, USN
Appellate Defense Counsel

Counsel for Petitioner

September 12, 1986

United States v. McCarthy, 25 C.M.A. 30, 54 C.M.R. 30 (1976), n.3 (dicta).

APPENDIX

APPENDIX A

UNITED STATES,

Appellee,

v.

ALVIN W. DODSON, JR., Private First Class
U.S. Marine Corps,

Appellant.

No. 47,612.
NMCM 82-3623.

U.S. Court of Military Appeals.

July 14, 1986.

Accused, private first class, United States Marine Corps, was convicted by general court-martial of attempted robbery, conspiracy to commit robbery, premeditated murder, felony-murder, robbery and wrongful communication of a threat, and he appealed. The United States Navy-Marine Corps Court of Military Review, 16 M.J. 921, affirmed. Review was granted. The United States Court of Military Appeals, 21 M.J. 237, affirmed in part and reversed in part. On petition for reconsideration, the United States Court of Military Appeals held that under the circumstances, it was not prejudicial error to admit testimony concerning incriminating out-of-court statements purportedly made by the coaccused, particularly in light of another witness' testimony concerning the accused's own admission of guilt to the offenses and the judge's instruction that the witness' testimony could be used substantively to establish the accused's guilt.

Denied.

For Appellant: *Kathleen J. Purcell, Esq.* (argued); *Joseph Remcho, Esq.* and *Captain David C. Larson, JAGC, USN* (on petition).

For Appellee: *Lieutenant Bradford H. Roberts, JAGC, USNR* (argued); *Captain Carl H. Horst, JAGC, USN.*

Opinion of the Court

On Petition for Reconsideration

PER CURIAM:

Appellate defense counsel requested that this Court reconsider its decision to affirm without oral argument part of the findings of guilty, and the sentence, in appellant's case. *See United States v. Dodson*, 21 M.J. 237 (C.M.A. 1986). We granted oral argument specifying the correctness of our earlier decision as the question to be resolved. After due consideration, we again affirm our prior disposition of the decision of the lower court. *United States v. Dodson*, 16 M.J. 921 (1983).

The Court of Military Review noted the testimony of Private Daniel Robbins which is the challenged evidence that is said to be unduly prejudicial. *See* Mil.R.Evid. 403, Manual for Courts-Martial, United States, 1969 (Revised edition).

> Private Robbins testified as to two statements made by PFC Garrett out of the presence of appellant. On the first occasion, PFC Garrett stated, "*It does look bad because I did have a knife with me that night.*" On the second occasion, Private Robbins overheard a jail cell soliloquy of PFC Garrett in which he stated, "*I wish I wouldn't have brought the knife that night . . nobody was supposed to get hurt.*"

United States v. Dodson, supra at 927 (emphasis added). Garrett, a co-accused in this case, had been previously tried and convicted for these offenses. He was called as

a government witness in this case and, *inter alia*, he denied that he had a knife on the night of the killing and that he ever said that he had a knife. On cross-examination by defense counsel, he again repeated his denial that he had a knife or any other weapon.

Defense counsel objected to the Government's calling Private Robbins as a witness to testify to certain incriminating statements purportedly made by Private First Class Garrett. Trial counsel responded with the following:

> The Government would note several things about the argument presented by the defense on this matter. The defense cited a Military Rule of Evidence, that is 801D, and the requirements which Rule 801D places upon the consideration of otherwise inadmissible hearsay for substantive purposes. The Government would note that it is its position that this hearsay is not admissible under 801 as an exception to the hearsay rule for consideration by the court-martial members on the substantive issues before this Court. It's the Government's position that this evidence is admissible under Rule 613 as an impeachment of this witness regarding whatever denials he may choose to make of certain facts. The Government believes that it is proper impeachment, that it is recognized as proper impeachment, in two of the cases cited by the defense, that is the *TAVAROS* AND *MARTIN* cases, and in several cases which the Government will also cite.
>
> * * * * * *
>
> The Government would note that in the present DODSON case PFC GARRETT does deny certain facts that the Government can contradict with prior inconsistent statements. They will go not to DODSON's participation but to GARRETT's.
>
> Now, the Government would return now to the question of just what PFC GARRETT is going to say.

> The Government had made, or attempted to make it clear, that is by no means certain what PFC GARRETT is going to say. It has been properly prevented from discussing this offense with PFC GARRETT. The Government has discussed the matter with PFC GARRETT, and the Government is aware of PFC GARRETT's previous testimony. On the basis of that, it's the Government's belief that GARRETT will voluntarily and willingly provide some information which will be pertinent and helpful to the Government's case. It's anticipated that he may well continue to deny some aspects of his activities on the morning of 1 June. If he does so, and the Government is or believes he may, but is by no means certain, then the Government would contend that his statements in this courtroom may be properly admitted under Rule 613, that is may be properly contradicted under Rule 613 by his prior statements which are inconsistent with his testimony.

The military judge made the following ruling concerning the defense counsel's objection to the testimony of Private Robbins as to out-of-court statements of the co-accused Garrett:

> It's the court's ruling based upon the cases cited by the trial counsel that the Government may impeach PFC GARRETT by calling Private ROBBINS to testify with regard to the statement that was allegedly made according to ROBBINS by PFC GARRETT one night while confined. The cases cited by the Government essentially indicate the law which the court feels relevant in this particular case. It appears to the court that the Government under the new military rules of evidence is permitted to impeach its own witnesses by introducing prior inconsistent statements of the witness. I have balanced the probative value against the unfair prejudicial effect, if any of such evidence

> and have concluded that it is admissible in this case. The alleged declarant PFC GARRETT will be in trial and will be subject to cross-examination as will the witness who may be testifying regarding the statement. I consider that a limiting instruction is of course, required, and I will give one taken from Paragraph 17.08 of the federal jury instruction book. Any questions with regard to the court's ruling?

We have again reviewed this record of trial for evidence of bad faith on the part of the prosecution in calling Private Garrett as a witness. *See United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 778, 83 L.Ed.2d 773 (1985). The prosecution's pretrial refusal to accept a defense proffered stipulation of fact as to appellant's presence at the crime scene on the night in question, in lieu of Garrett's testimony, does not indicate bad faith. This stipulation was offered for speedy-trial purposes, and it was extremely limited in comparison with Garrett's later trial testimony. *See Tennessee v. Street*, ___ U.S. ___, 105 S.Ct. 2078, 2082-83, 85 L.Ed.2d 425 (1985). Moreover, the prosecution was not required to forfeit its right to call Garrett, a clearly material witness, solely on the basis of a single sworn statement in extenuation and mitigation at his own trial. *See United States v. Webster*, 734 F.2d 1191, 1192-93 (7th Cir. 1984). *Cf. United States v. Hogan*, 763 F.2d 697, 703 (5th Cir. 1985). Finally, even if prosecutorial misconduct were involved in calling Garrett as a witness, reversal is not justified on this basis alone. *United States v. Young*, ___ U.S. ___, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Crouch, supra.*

Appellate defense counsel argues that Robbins' testimony concerning Garrett's statements showed Garrett's guilt and further supported a natural inference that appellant, his companion for the evening, was also guilty. We note, however, that a second government witness, Private Stephen Weaver, had earlier testified to appellant's

own admission of guilt to these offenses, although he indicated that appellant later attempted to repudiate this admission. Furthermore, he stated that appellant said, "Fuck that swine. I'm glad we did it. He shouldn't have been fucking around with GARRETT anyway." If the members believed Weaver, any potential for undue prejudice flowing from Robbins' testimony would clearly be minuscule. *See Parker v. Randolph*, 442 U.S. 62, 77-78, 99 S.Ct. 2132, 2141-42, 60 L.Ed.2d 713 (1979) (Blackmun, J., concurring in part and concurring in the judgment); *United States v. Gorny*, 732 F.2d 597, 604 (7th Cir. 1984); *see also United States v. Crouch, supra* at 624. More importantly, however, the military judge instructed the members on three occasions, once in great detail, that Robbins' testimony could not be used substantively to establish appellant's guilt. *See United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984); *see also Tennessee v. Street, supra* 105 S.Ct. at 2082; *cf. United States v. Hogan, supra* at 702. We conclude there was no prejudicial error by the military judge under the circumstances of this case.

The petition for reconsideration of this Court's decision (21 M.J. 237) is denied.

Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES,

Appellee,

v.

ALVIN W. DODSON, JR., Private First Class
U.S. Marine Corps,

Appellant.

No. 47612.
NMCM 82-3623.

U.S. Court of Military Appeals.

Jan. 27, 1986.

Accused was convicted by general court-martial of attempted robbery, conspiracy to commit robbery, premeditated murder, felony-murder, robbery and wrongful communication of a threat, and he appealed. The United States Navy-Marine Corps Court of Military Review, 16 M.J. 921, affirmed. Review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) extrinsic evidence of prior inconsistent statements purportedly made by a coaccused was admissible to impeach the coaccused, and (2) the felony-murder specification was multiplicious with the premeditated murder specification, but the accused was not prejudiced as to the sentence.

Affirmed in part and reversed in part.

Everett, C.J., concurred with opinion.

For Appellant: *Kathleen J. Purcell, Esq.*, and *Joseph Remcho, Esq.* (on brief); *Commander David C. Larson, JAGC, USNR.*

For Appellee: *Captain W.J. Hughes, JAGC, USN*, and *Lieutenant William V. Cerbone, Jr., JAGC, USNR* (on

brief); *Captain Carl H. Horst, JAGC, USN,* and *Major J.S. Uberman, USMC.*

Opinion of the Court

COX, Judge:

Appellant was tried by a general court-martial composed of members in September and December 1981 at Camp Foster, Okinawa. Contrary to his pleas, he was found guilty of attempted robbery, conspiracy to commit robbery, premeditated murder, felony murder, robbery and wrongful communication of a threat, in violation of Articles 80, 81, 118(1), 118(4), 122, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 918(1), 918(4), 922, and 934, respectively. He was sentenced to a dishonorable discharge, confinement at hard labor for life, total forfeitures, and reduction to the lowest enlisted pay grade. The convening authority approved the findings of guilty and the sentence. The Court of Military Review affirmed. 16 M.J. 921 (1983).

This Court granted review on the following issue raised by appellate defense counsel.

> WHETHER IT WAS PROPER TO ALLOW EXTRINSIC EVIDENCE OF STATEMENTS PURPORTEDLY MADE BY THE CO-ACCUSED GARRETT UNDER THE GUISE OF IMPEACHING GARRETT.

This Court also specified the following issue for review:

> WHETHER SPECIFICATION 2, CHARGE III (FELONY MURDER) IS MULTIPLICIOUS WITH SPECIFICATION 1, CHARGE III (PREMEDITATED MURDER) AND SHOULD BE DISMISSED.

I

The facts surrounding the granted issue are fully detailed in the Court of Military Review's decision cited

above. Appellant basically asserts that the military judge erred in allowing trial counsel to impeach his own witness by extrinsic evidence of prior inconsistent statements. *See generally United States v. Banker*, 15 M.J. 207, 211 (C.M.A.1983). Such evidence, he argues was unduly prejudicial within the meaning of Mil.R.Evid. 403 because it also constituted inadmissible substantive evidence of his guilt of the charged offenses. *See generally United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975). He also argues that the prosecution's impeachment proffer under Mil.R.Evid. 613(b) was a subterfuge to put this inadmissible substantive evidence before the court members. *See United States v. Dennis*, 625 F.2d 782, 796 (8th Cir 1980).

We agree with the court below that such impeachment was proper under Mil.R.Evid. 607 and 613(b). *See generally United States v. Hogan*, 763 F.2d 697, 701-03 (5th Cir.1985). We also agree with the lower court's finding that the trial judge did not abuse his discretion provided in Mil.R.Evid. 403 in permitting the admission of this impeachment evidence. *See United States v. Dodson, supra* at 928; *see generally United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).* Finally, we conclude that the evidence of record supports the Court of Military Review's finding that no bad faith existed on the part of the prosecution in the present case. Article 66, UCMJ, 10 U.S.C. § 866.

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* We disagree with appellant's assertion that even the Court of Military Review used Robbins' testimony as substantive evidence of his guilt. That court expressly referred to the testimony of Mrs. Gould in this regard. *See United States v. Dodson*, 16 M.J. 921, 928 (1983). We also do not agree that the limiting instructions given by the military judge in this case were insufficient to cure any undue prejudice which might result from the admission of this impeachment evidence. *United States v. DeLillo*, 620 F.2d 939, 946, 947 (2d Cir.1980). *Cf. United States v. Hogan*, 763 F.2d 697, 702 (5th Cir.1985). *See generally United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 471, 83 L.Ed.2d 450 (1984).

II

The specified issue in this case can be resolved on the basis of the decision of this Court in *United States v. Teeter*, 16 M.J. 68 (C.M.A.1983). "[T]he homicide elements of felony-murder are included within premeditated murder, and" the robbery "elements of felony-murder are the same as those of the separate" robbery offense. "[A]ll of the elements of felony-murder . . . fall within the . . . premeditated murder" and robbery offenses. "Therefore, we hold that the felony murder charge is multiplicious" (*id.* at 72) and must be dismissed. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct.1432, 63 L.Ed.2d 715 (1980). *See Ball v. United States*, ___ U.S. ___, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *United States v. Baker*, 14 M.J. 361 (C.M.A.1983). However, we are satisfied that this multiplicity did not prejudice appellant as to sentence.

III

The decision of the United States Navy-Marine Corps Court of Military Review is reversed as to specification 2 of Charge III. The finding of guilty thereon is set aside and that specification is dismissed. In all other respects the decision below is affirmed.

EVERETT, Chief Judge (concurring):

From my consideration of the relevant facts, which are set out in the decision of the Court of Military Review, 16 M.J. 921 (N.M.C.M.R.1983), I agree that the Government had a legitimate purpose in calling appellant's coaccused Garrett, as a witness. It was important to establish through him that appellant had been his companion on the evening of the murder.

I am not fully convinced, however, of trial counsel's need to ask Garrett, on direct examination, whether he had been carrying a knife at the time, when—from the events in Garrett's own trial—the trial counsel must have known he

would deny this. Indeed, a reading of the entire record might suggest that trial counsel asked this question solely to provide a basis to have Garrett's prior statements introduced as impeachment evidence, *see* Mil.R.Evid. 613(b), and in the hope that the court members would then consider this evidence for a substantive purpose, for which it would be inadmissible, *see* Mil.R.Evid. 8019d)(1)(A). Nonetheless, because there is some basis for determining otherwise, I shall give trial counsel the benefit of the doubt and join the military judge in assuming that this question was not asked in bad faith and for an improper purpose.

Regardless of trial counsel's purpose, a significant risk existed that, once admitted, the impeachment evidence—Garrett's extrajudicial statements to a fellow prisoner—would be used by the court members as substantive evidence that he had possessed a knife when he and appellant had encountered the victim on the evening of the homicide. Even though a military judge can instruct the court members as to the limited purpose for which impeachment evidence can be used—just as was done in this case—the risk of prejudice from an improper substantive use of the impeachment evidence is high. Therefore, as to such evidence, a sensitive application of Mil.R.Evid. 403 is important in assuring a fair trial.

As the authors commented in S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 176, "Rule 403 may be the most important new Rule." One of the reasons for this view is that it gives the military judge "enormous leeway . . . to judge the merits and demerits of admitting any evidence that satisfies the other Rules of Evidence." *Id.* To resolve properly an objection lodged under this rule, "the judge should carefully analyze the nature of the case, the court-members, the other evidence in the case and the way the case has been presented in order to estimate the real likelihood in the particular case that the evidence would prejudice the court-members hearing the case." *Id.* at 177.

From my consideration of this case and some others, I have the impression that not all trial judges are performing this very important balancing task when a party suggests that evidence otherwise admissible—either generally or for a limited purpose—may unfairly prejudice his side. My concern would be ameliorated somewhat by more frequent use of special findings, as urged by the authors of the *Military Rules of Evidence Manual, supra*, who point out:

> Special findings will provide trial and appellate courts with two obvious benefits. First, appellate courts will be able to appreciate the formula used to resolve complex issues below. As a result, reversals for abuse of discretion will be greatly reduced. The second benefit of special findings is that they provide counsel with an opportunity to correct erroneous resolutions in the trial court, rather than months or years later on appeal.

Id.

In this case, I have concluded that—in light of the limiting instructions—appellant was not prejudiced by receipt of Garrett's pretrial statements in evidence. However, I would be more comfortable with the result if the military judge had entered special findings which explained how he performed the sensitive balancing required by Mil.R.Evid. 403.

APPENDIX C

UNITED STATES
v.

ALVIN W. DODSON, JR., 230 98 7418,
Private First Class (E-2), U.S.
Marine Corps.

NMCM 82 3623.

U.S. Navy-Marine Corps Court of
Military Review.

Sentence Adjudged 23 Dec. 1981.

Decided 30 Aug. 1983.

Accused was convicted by general court-martial of attempted robbery, conspiracy to commit robbery, premeditated murder, felony-murder, robbery and wrongful communication of a threat, and he appealed. The Navy-Marine Corps Court of Military Review, Eoff, J., held that: (1) evidence was sufficient to support convictions; (2) accused, who was in pretrial confinement for a period of 89 days prior to his release, was not denied his right to a speedy trial, particularly in light of fact that preparation of accused's court-martial was considerably more complicated and difficult than most; and (3) trial judge did not abuse his discretion in admitting as excited utterances murder victim's statements attributable to victim immediately after one witness had interrupted an altercation outside a bar; however, those portions of their testimony concerning victim's intent to resist being robbed, even at risk of being killed, were more probative as evidence of his state of mind and not as evidence to explain the offense and should have been admitted on that basis; furthermore, there were no confrontation clause problems by the use

of deceased victim's statements since there were sufficient corroborating circumstances to ensure their trustworthiness and since there was sufficient evidence regarding victim's level of intoxication that cross-examination of victim as to his perceptions, even if possible, would have achieved little extra.

Affirmed.

Joseph Remcho, Civilian Counsel.

Kathleen J. Purcell, Civilian Counsel.

LCDR Richard K. Delmar, JAGC, USNR, Appellate Defense Counsel.

LCDR Michael R. McGuire, JAGC, USN, Appellate Government Counsel.

Before BOHLEN, EOFF and KERCHEVAL, JJ.

EOFF, Judge:

Appellant was tried by a general court-martial constituted of officer members. Contrary to his pleas, appellant was convicted of attempted robbery, conspiracy to commit robbery, premeditated murder, felony murder, robbery and wrongful communication of a threat, in violation of, respectively, Articles 80, 81, 118, 122 and 134, Uniform Code of Military Justice, (UCMJ), 10 U.S.C. §§ 880, 881, 918, 922 and 9234. He was sentenced to confinement at hard labor for life, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade and a dishonorable discharge. The convening authority approved the findings and sentence without modification.

Appellant has assigned seven, separate errors. We will address the first five.

I. The Conviction Should be Reversed on the Facts

On the early morning of 1 June 1981, the victim, Corporal Murphy, was drinking at the "Snack" Shige in Hen-

oko Ville, Okinawa, Japan. Appellant, Private First Class (PFC) Garrett and Lance Corporal (LCPL) Chupp were on liberty together in Henoko that morning. PFC Garrett was dressed in dark pants and a blue windbreaker, appellant wore dark clothing, and LCPL Chupp wore a T-shirt and baseball cap. Corporal Murphy was carrying a large amount of money and offering to pay for drinks. His actions could be observed by others in the bar, including PFC Garrett. LCPL Chupp, a white male, and PFC Garrett, a black male, left the Snack Shige and joined a taller black male outside. They looked in the Snack Shige several times. On one of these occasions Corporal Murphy offered to buy them a drink. When they declined, he appeared to get upset and went outside. Mrs. Gould, a friend of Corporal Murphy's who was at the Snack Shige, went outside to see what was happening. She observed Corporal Murphy with two black males and a white male. The taller black male was waving a silver pointed object in Corporal Murphy's face and saying, "I'm going to get you man." When Mrs. Gould appeared, the confrontation broke up, Corporal Murphy returned to the Snack Shige, and the remaining three departed. As Corporal Murphy reentered—upset and red faced—he hit the door with his fist and stated that the three men were wielding a knife, a pipe and a stick, and that they were trying to rob him. PFC Garrett testified they were just "screwing around" with him, that he had put his arm around Corporal Murphy and may have even touched his wallet.

Murphy stayed at the Snack Shige and left between 0230 and 0300 by saying he was calling it a night. At about 0300 PFC Garrett was seen at the Snack Shige. A Marine testified that, as he was walking his girlfriend to her home about 0300, a black male, dressed in dark clothing and a windbreaker, walked rapidly past them and disappeared around a corner. Shortly thereafter, the same person reappeared with another tall black male who was dressed in dark clothing. They returned back up the street

and turned right at the top of a hill. The path the two men were taking was in the direction where Corporal Murphy's body was later found.

Appellant, PFC Garrett and LCPL Chupp took a taxi back to Camp Schwab and logged-in at the gate at 0319. The cab driver testified he picked them up near the Snack Hana, which was around the corner from where Corporal Murphy's body was discovered between 0430 and 0440 that morning. His empty wallet was found next to him. An autopsy revealed he bled to death from a stab wound in the back which punctured one of his lungs and his aorta. He had other nonfatal stab wounds and abrasions. The doctor who performed the autopsy was of the opinion that the attacker who inflicted the fatal wound would been covered with blood, but this would be less likely had the fatal wound been inflicted while Corporal Murphy was on the ground. An Army serologist tested various items of clothing seized from appellant and PFC Garrett. Probable human blood stains were found on PFC Garrett's windbreaker, pants and shoes. No blood stains were found on appellant's clothing. The cab driver who took the three men back to Camp Schwab testified he noticed nothing unusual in their appearance and noticed no blood on their clothing.

Private Weaver, who occupied a cell in the same area of the brig as appellant, PFC Garrett and LCPL Chupp testified as to conversations among the three men. He stated that he heard appellant say "F__k that swine. I'm glad we did it. He shouldn't have been f__king around with Garrett anyway."

Based upon these facts, appellant has raised several alternative conclusions which point away from findings of guilty. These same conclusions were vigorously argued before the court members prior to their arriving at what we also find to be appropriate and sustainable findings of guilty.

II. The Accused Was Denied His Right to Speedy Trial

Both parties agree that appellant was in pretrial confinement for a period of 89 days before his release on 1 September 1981. The following chronology which is substantially the same as that stipulated to by the parties sets out the events leading up to the first session of this trial:

1 June 1981 Alleged offenses occurred. Okinawa Prefectual Police assume primary jurisdiction. CID responds to initial complaint. NIS begins bi-lateral investigation.

2-3 June Numerous investigative leads followed in effort to identify suspects.

4 June Co-accused GARRETT identified as suspect, taken into custody by Japanese Police, released to NIS and confined during early morning hours of 5 June. CID criminal investigation report complete.

5 June Co-accuseds DODSON and CHUPP apprehended and confined. Permissive search of GARRETT's and CHUPP's personal belongings conducted. CHUPP makes written statement to NIS. GARRETT makes oral statement to NIS. Japanese authorities relinquish primary jurisdiction over all offenses except a violation of Japanese "Sword and Firearms Law." DODSON provided and consults with legal counsel Major B.A. WARD, USMC.

10 June NIS report from Annapolis completed. Clothing seized from DODSON, GARRETT and CHUPP given to Japanese police for lab examination.

11 June NIS report from Washington, D.C.

12 June GARRETT administered, at his request, polygraph examination.

15-16 June GARRETT questioned by Japanese Police.

16 June NIS report from Great Lakes completed.

17 June NIS report from Camp Lejeune and Washington, D.C. completed.

17-19 June Numerous interviews of individuals acquainted with the suspects and/or victim were conducted.

20 June Original charges preferred against accused.

22-26 June Japanese police provide NIS with copies of statements taken from possible witnesses within the Japanese community.

22-23 June Copies of service records of 3 co-accused prepared and provided to defense counsel.

29 June NIS (Camp Hansen) interim report completed.

30 June NIS (Annapolis) report completed.

1-2 July Copies of NIS interim report provided to defense counsel.

6 July Meeting held among Article 32 investigating officer, trial counsel, asst. trial counsel, MAJ Ward, (DODSON'S detailed defense counsel), and CAPT Canode (Garrett's detailed defense counsel), Government attempts to establish date of 10 July 81 for Art. 32 investigation. Both defense counsel request continuance until 18 July 81.

7 July Addendum to NIS report forwarded to defense counsel.

9 July Forensic pathological report of victim completed by Japanese.

11 July Magistrate's hearing materials copied and provided in response to defense request. Health records of CHUPP and GARRETT copied and provided to defense counsel. Search for DODSON's health record, in response to defense discovery request, produces negative results.

13 July Numerous personnel who had been incarcerated with the suspects were interviewed.

14 July Additional charges preferred against accused.

15 July Two primary government witnesses interviewed in brig. Pvt. Kenneth L. HOWARD and LCpl Steven S. WEAVER. WEAVER makes written statement. Government sent a message requesting an in depth interview of potential key witness who is incarcerated at Leavenworth.

16 July Aerial Photos of Henoko prepared at defense request and provided to Defense Counsel.

17 July PVT Daniel ROBBINS interviewed at the Disciplinary Barracks, Leavenworth, makes written statement. Civilian defense counsel, Mr. Joseph REMCHO, arrives Okinawa, Japan. LCpl WEAVER re-interviewed. Service records of Corporal MURPHY copied and furnished to defense in response to discovery request. NIS receives Japanese Pathology report.

18 July Article 32 begins.

19 July Government made aware of results of interview with PVT ROBBINS, via telephone. Key government witness Mrs. Sandra E. GOULD departs island for new location in Hawaii. DODSON makes demand for speedy trial. Trial counsel and asst. trial counsel interview LCpl WEAVER for first time. DODSON's first discovery request.

20 July Art. 32 investigation continues. LCpl WEAVER makes a second written statement. Additional brig confinees interviewed. Translation of Pathology report.

21 July Art. 32 investigation continues. Government receives message detailing results of interview with PVT Daniel ROBBINS. Art. 32 investigation continues. Defense provided with copy of Pathology report. Crime lab report completed.

22 July DODSON makes request for discovery, also requests PVT Daniel ROBBINS be made available as witness. NIS receives clothes back from lab.

23 July Witness WEAVER transferred and confined at MCAS, Iwakuni, Japan.

24 July Translation of Japanese lab report completed.

25 July Art. 32 investigation continues. Third Battalion, 4th Marines, including appointing authority, depart Okinawa for Camp Fuji, Japan. Defense counsel provided with copy of lab report.

27 July Art. 32 investigation continues. GARRETT requests additional polygraph.

28-29 July Art. 32 investigation continues.

30 July PVT. Kenneth L. HOWARD, USMC, re-interviewed, makes a written statement. PFC Aaron Todd JONES USMC, while being apprehended for drunk and disorderly conduct, is overheard confessing to killing victim "MURPHY". While being interrogated JONES admits his confession is false and provides alibi for night in question.

31 July DODSON makes request for discovery.

2 Aug Detailed (defense counsel) to Iwakuni TAD for SPCM.

3 Aug GARRETT undergoes additional polygraph.

7 Aug Detailed (defense counsel) returns from Iwakuni.

8 Aug Art. 32 investigation continues.

9 Aug Mr. REMCHO contacts CAPT HOPSON via telephone, makes request for a tentative trial timetable.

10 Aug. Art. 32 investigation continues and closes.

11 Aug NIS conducts expanded crime scene search, attempts to locate murder weapon.

13 Aug PFC Robert E. PORTER, USMC, is interviewed and verifies "JONES" alibi on night in question.

14 Aug Government reopens Art. 32 investigation, closes same day.

15 Aug Verbatim transcript of Art. 32 investigation completed.

17 Aug Asst. trial counsel hand carries Art. 32 transcript, investigating officer's recommendation, and clothing seized from 3 co-accuseds to Camp Fuji and Camp Zama, Japan.

18 Aug Battalion Commander reads Art. 32 transcript and signs recommendation for trial by General Court-Martial. Crime lab re-examination of clothing complete. Asst. trial counsel travels from Yokota to Camp Zama.

19 Aug Article 34 advice letter completed. Defense counsel sends two mailgrams requesting discovery and requesting witnesses at government expense. Gov't does not receive mailgram regarding request for witnesses.

20 Aug Charges referred to trial, accused served with copy of charges. Art. 32 transcript sent to civilian counsel via courier.

21 Aug Asst. trial counsel travels from Camp Zama to Yokota to Iwakuni, talks with WEAVER, then returns to Okinawa. PVT. Daniel ROBBINS administered hypnotic interview at Fort Leavenworth in an attempt to ascertain name of potential witness. Prosecution received one defense mailgram of 18 Aug.

22 Aug Government receives message detailing travel itinerary for return of PVT ROBBINS. Government receives additional message informing of hypnotic interview.

23 Aug NIS begins attempts to locate potential witnesses identified during hypnotic interview.

24 Aug Docketing session held. Art. 39(a) session for DODSON case set for 1 Sept. Art. 39(a) session, case of GARRETT set for 31 Aug., Art. 39(a) session for CHUPP case set for 31 Aug.

25 Aug Discovery material sent via courier to civilian counsel.

27 Aug Additional, requested, discovery material sent to civilian counsel via courier.

31 Aug Military forces on Okinawa in tropical cyclone condition 1 (emergency), all normal working activities shutdown due to typhoon. PVT ROBBINS arrives Okinawa and confined.

1 Sept Art. 39(a) session held in GARRETT case. Defense request for continuance to 5 Oct. granted. DODSON released from confinement. Defense counsel informed government will seek continuance in case.

2 Sept 39(a) session held for DODSON case. NIS investigation still going on.

In the instant case, pretrial confinement was not of sufficient duration to trigger the presumption of prejudice enunciated in *United States v. Burton,* 21 U.S.C. M.A. 112, 44 C.M.R. 166 (1971). The government is required to show that it proceeded with reasonable diligence, without deliberate oppression of appellant, and without a lack of concern for the requirement of expeditious persecution. *United States v. Hagler,* 7 M.J. 944 (N.C.M.R.1979). Thus, the sixth amendment right to speedy trial provides the appropriate standard for assessing the Government's conduct and requires that we consider: (a) the length of the delay; (b) the reasons for the delay; (c) specific prejudice to the appellant; and (d) any demand for speedy trial. *United States v. Amundson,* 48 C.M.R. 914 917 (N.C.M.R.1974), *citing Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

Appellant asserts specific prejudice in that his defense team was required to make an unnecessary trip to Okinawa at his expense due to the government's manipulation of the trial schedule.

Appellant's civilian trial defense counsel and trial counsel had a phone conversation in mid-August concerning scheduling of the case. Trial counsel stated that he informed opposing counsel that the government intended to try PFC Garrett first so that he could be called as a witness at appellant's trial. The first session of PFC Garrett's trial was scheduled to be held 29 August or later. Civilian defense counsel assumed PFC Garrett's case would last a week and that appellant's trial could start as early as 7 or 8 September. Based on this, the three members of the defense team proceeded to Okinawa from San Francisco and arrived there on 31 August. Due to the military judge granting a continuance in PFC Garrett's case until 5 October, the government asked for a continuance in appellant's trial. The defense offered to stipulate to PFC Garrett's testimony in order to proceed with the trial as soon as possible. The defense stipulation was narrower in scope than the testimony the government expected to elicit from PFC Garrett. The government, therefore, declined to join in the stipulation. The military judge then granted a continuance until a later date to be set by the court and the parties upon completion of PFC Garrett's trial. The next session was called to order on 3 December.

As evident from a reading of the facts of this case and the preceding chronology, the preparation of appellant's court-martial was considerably more complicated and difficult than most. The additional delay until after PFC Garrett's trial is not without precedent. *Barker v. Wingo, supra; United States v. Johnson,* 3 M.J. 143 (C.M.A.1977). Appellant suffered additional expenses when both civilian defense counsel and their investigator made an extra trip to Okinawa. However, this was occasioned by a defense request for a continuance in PFC Garrett's case and not by a deliberate desire on the part of the government to prejudice appellant in his defense. The other instances of prejudices cited by appellant due to the delay have been considered and found to be unconvincing. The several in-

stances of demands for speedy trial made by appellant were answered by continued progress to trial by the government.

After considering the government's conduct under the standards set out in *Amundson, supra,* we find the appellant was not denied his right to a speedy trial.

III. The Government Improperly Used the Testimony of PFC Garrett to Inject Inadmissible Evidence and Taint the Trial

Appellant asserts that the fact of PFC Garrett's conviction was improperly brought to the court's attention by the trial counsel's examination of a prosecution witness, Miss Takara. The subject of her testimony at a prior proceeding was first broached by the lead defense counsel, who asked if she had "testified" at a prior "hearing." Later, on redirect, the government counsel referred to her being asked "questions" at "that same trial." PFC Garrett did not testify until five witnesses later. The military judge admonished trial counsel to avoid any references to a prior trial and did not issue an instruction to the members. Defense counsel chose to use the word "testimony"; therefore, whether labeled as a hearing or a trial, the perception of the members was most likely the same. There was no reference to whose trial or the result. Accordingly, we find no prejudice to appellant.

Appellant also alleges in this assignment of error, that the government used the testimony of Private Robbins, in the guise of impeaching PFC Garrett, as a ruse to bring impermissible hearsay before the members. Private Robbins testified as to two statements made by PFC Garrett out of the presence of appellant. On the first occasion, PFC Garrett stated, "It does look bad because I did have a knife with me that night." On the second occasion, Private Robbins overheard a jail cell soliloquy of PFC Garrett in which he stated, "I wish I wouldn't have brought the knife that night . . . nobody was supposed to get hurt."

From the outset, we do not view Private Robbins' testimony as being governed by hearsay considerations. The fact that PFC Garrett's prior statements were unsworn, would only be relevant if the government were attempting to enter them under Mil.R.Evid. 801(d)(1)(A) when the prior statement was "given under oath subject to the penalty of perjury." It is only when the extrajudicial statement is offered "to prove the truth of the matter asserted" that hearsay considerations control. Mil.R.Evid. 801(c).

In the instant case, the government offered Private Robbins' testimony concerning PFC Garrett's statements, not for the "truth of the matter asserted," but rather, as impeachment of PFC Garrett's credibility by characterizing Private Robbins' testimony as extrinsic evidence of prior inconsistent statements under Mil.R.Evid. 613(b). The use of extrinsic evidence for impeachment of a witness is limited to matters which are non-collateral, that is, those matters relevant to the determination of factual matters having a direct bearing upon guilt or innocence of the accused. Had PFC Garrett denied wearing "red sneakers" while in the brig, such would be collateral and Private Robbins could not be called to impeach PFC Garrett solely for that reason. To do so would unduly divert the members' attention from more probative matters. *See generally Munster, Military Evidence, 2d Ed.* 361-363 (1978).

A witness to the altercation outside of the Snack Shige, Mrs. Gould, testified that she observed a shiny, pointed object in the hand of the taller of the two black assailants (presumedly appellant), although she could not positively identify the object as a knife. PFC Garrett testified as to the circumstances of the altercation, including a description of clothing worn by himself and the co-defendants, the presence of another witness in addition to Mrs. Gould, and the actions of himself and the co-accuseds after the altercation ended. PFC Garrett, however, denied having a knife that evening. His two prior statements relating to possessing a knife were directly related to a factual matter

probative of guilt or innocence of appellant. To believe Private Robbins' testimony, that the statements were made, would cause the members to doubt the truth of PFC Garrett's denial, and thus believe that he either possessed a knife that evening or supplied one to appellant or LCPL Chupp.

This is a proper use of impeachment and a proper result of an attack upon a witness' credibility so long as the military judge instructs the members to view the impeachment evidence, not as substantive evidence, but rather, as being determinative of the credibility of the witness. In the instant case, the military judge issued the appropriate instruction on two occasions: first, in his instructions to the members prior to their deliberation on findings; and second, in response to the trial counsel erroneously referring to the statements as substantive evidence during closing argument.

We are unconvinced that government counsel harbored ill motives by using Private Robbins' testimony to impeach PFC Garrett. This was not an occasion in which the sole purpose for calling PFC Garrett was to impeach him. *See United States v. DeLillo,* 620 F.2d 939 (2d Cir.1980). As previously mentioned, he testified to a number of matters. Because he was a previously convicted accused called as a government witness, it was reasonably forseeable that the government would have to impeach its own witness. Furthermore, the government's ability to foresee the trouble spots in PFC Garrett's testimony was hampered by his trial defense counsel's refusal to allow him to be interviewed by the Government prior to his taking the stand.

Lastly, we conclude that the military judge did not abuse his discretion by finding that the prejudicial effect of Private Robbins' testimony did not outweigh its probative value, especially in light of his cautionary instruction. *See United States v. Leslie,* 542 F.2d 285 (5th Cir.1976).

IV. Hearsay Statement Attributed to the Deceased Should Not Have Been Admitted into Evidence

Appellant challenges the admission of testimony regarding statements attributed to the victim, Corporal Murphy. Immediately after Mrs. Gould interrupted the altercation outside the Snack Shige, she testified that while returning with Corporal Murphy to the bar, "(H)e told me that they had tried to rob him, that the taller white male also had a butterfly knife behind his back, I guess concealed, and so did Garrett." She described Corporal Murphy's appearance as, "His face was flushed, his eyes were bulging, and he seemed very nervous." Prior to entering the bar, they were joined by LCPL McCurry, who also described Murphy as nervous. Upon entering the bar, both Mrs. Gould and LCPL McCurry testified that Corporal Murphy struck, and dented, the aluminum door to the bar. LCPL McCurry testified Corporal Murphy then said "that they tried to take his money and that no one could take his money, they would have to kill him first." Regarding the same outburst, Mrs. Gould testified:

> He muttered something about they had tried to rob him; if anybody wanted his money, they would have to kill him first.
>
> * * * * * *
>
> He said several times that if anybody wanted his money, they would have to kill him, he wasn't going to give it up. He worked very hard for his money, and he also showed us how the taller white male had tried to take his wallet.

About an hour after the altercation, Corporal Murphy left the Snack Shige and spoke for about fifteen minutes with a Japanese national, Ms. Tsukayama. She testified that he stated, "He was looking for two blacks and one white."

The military judge admitted Mrs. Gould's and LCPL McCurry's testimonies as excited utterances of Corporal

Murphy under Mil.R.Evid. 803(2). He gave a limiting instruction regarding those portions of the statements in which Corporal Murphy stated if anyone wanted to rob him that they would have to kill him. He instructed the members to consider those portions only for the purpose of establishing Corporal Murphy's "state of mind," and not the state of the accused's mind. The remainder of the statements were considered equally with other substantive evidence. Ms. Tsukayama's testimony was admitted as evidence of Corporal Murphy's "state of mind."

We find that the military judge did not abuse his discretion by admitting as excited utterances, those portions of Mrs. Gould's and LCPL McCurry's testimonies which directly related to the circumstances of the altercation. We find, however, that those portions of their testimonies concerning Corporal Murphy's intent to resist being robbed, even at the risk of being killed, were more probative as evidence of his state of mind, than as evidence to explain the event. Although tangentially admissible as excited utterances, it would have been better to admit such evidence under Mil.R.Evid. 803(3) to prove that Corporal Murphy later acted in conformity with his stated intent. Despite his misdesignation, the military judge, nonetheless, gave an instruction consistent with that required for state of mind evidence. The fact that we prefer a different theory of admitting evidence at trial does not prevent us from finding it admissible upon review. *See United States v. Barnes*, 586 F.2d 1052 (5th Cir.1978).

As for Corporal Murphy's statement to Ms. Tsukayama, we also find that it was properly admitted as evidence of his state of mind under Mil.R.Evid. 803(3). A nexus between the statement and the altercation need not be shown. Instead, it must be shown how his stated intent is relevant to factual matters having a direct bearing upon the guilt or innocence of the accused. In the instant case, Corporal Murphy stated to Mrs. Gould, prior to leaving the Snack Shige for the evening, that he was going home to Camp

Schwab. His subsequent statement to Ms. Tsukayama is relevant to explain the location of his body at a point not along a direct route from the bar to his barracks and that his intended confrontation of the "two blacks and a white" may have taken place. *See United States v. Pheaster*, 544 F.2d 353 (9th Cir.1976) (out-of-court statement of kidnap victim as to whom he planned to meet at the approximate time of the kidnapping admitted under state of mind exception).

We also find no confrontation clause problems by the use of the deceased victim's statements. With each statement, there were sufficient corroborating circumstances to ensure their trustworthiness. *See United States v. Johnson*, 3 M.J. 143 (C.M.A.1977). There was sufficient evidence regarding the victim's level of intoxication that cross-examination of the victim as to his perception, even if possible, would have achieved little extra.

V. Expert Testimony Relevant to the Reliability of the Key Prosecution Witness was Improperly Excluded

The military judge denied appellant's request for an order requiring the government to pay the expenses and reasonable expert witness fees of Prof. Craig Haney, a psychologist, who held himself out as an expert in the field of perception and memory. He also ruled that if the testimony of Prof. Haney were to be offered by the defense it would be inadmissible. The military judge stated two grounds. First, he concluded that the testimony would invade the province of the fact finders because issues to which Prof. Haney would testify could be resolved by an average juror based upon his or her observation of the witness, the cross-examination of the witness and other evidence introduced in the case. Second, the judge found that the prejudicial effect of the proposed testimony outweighed its probative value. We find that the military judge did not err in denying appellant's request. Prof. Haney's proffered science is not so generally accepted

within the scientific community as to meet the standards of reliability applicable to scientific evidence. *United States v. Fosher,* 590 F.2d 381 (1st Cir.1979); *See United States v. Amaral,* 488 F.2d 1148 (9th Cir. 1973).

We find assignments of error VI and VII to also be without merit. Accordingly, the findings and sentence as approved on review below are affirmed.

Senior Judge BOHLEN* and Judge KERCHEVAL concur in the result.

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*Senior Judge Bohlen took final action in this case prior to his retirement from the Court on June 30, 1983.